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In the

Supreme Court of the United States

October Term, 1993

KEY TRONIC CORPORATION,
Petitioner,

v.

UNITED STATES, ET AL.,
Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

Whether under the federal Superfund statute, a private party may recover attorneys' fees as response costs when fees are incurred to (a) prepare and negotiate a reasonable scope of work and consent decree related to cleanup of contaminated property; (b) search for and identify other parties responsible for the contamination; and (c) litigate cost-recovery actions against other responsible parties to compel their participation in the remediation.

PARTIES

Key Tronic Corporation ("Key Tronic") and the United States were parties in the proceeding before the Ninth Circuit. Key Tronic has no parent company. All of its subsidiaries are wholly owned.

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I. OPINIONS BELOW

The opinion of the Ninth Circuit in *Key Tronic Corp. v. United States* is reported at 984 F.2d 1025 and is reprinted in Appendix A to Key Tronic's petition for certiorari ("Pet. Cert."). The opinion of the district court is reported at 766 F. Supp. 865 and is reprinted in Pet. Cert. Appendix B. The opinions of the Ninth Circuit and the district court in the companion case of *Stanton Road Associates v. Lohrey Enterprises*, 984 F.2d 1015 (9th Cir.), *cert. dismissed*, 126 L.Ed.2d 609 (1993), are reprinted in Pet. Cert. Appendices C and D.

II. JURISDICTION

The Ninth Circuit entered its judgment on January 28, 1993. On June 7, 1993, the Ninth Circuit denied Key Tronic's petition for rehearing and also denied Key Tronic's suggestion for rehearing en banc. Pet. Cert. Appendices E, F. The petition for certiorari was timely filed on September 3, 1993 and the Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

III. STATUTES

This case involves the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), as amended by the 1986 Superfund Amendments and Reauthorization Act ("SARA"). The CERCLA statute is codified at 42 U.S.C. § 9601 *et seq.*, pertinent sections of which are appended hereto.

IV. STATEMENT OF THE CASE

This case concerns the recovery of Key Tronic's costs of performing environmental cleanup measures to protect public

health and then pursuing legal action against other liable parties to enforce CERCLA's scheme of requiring all who contribute to environmental contamination to pay for its cleanup.

A. FACTUAL BACKGROUND

Spokane County operated the Colbert Landfill (the "Landfill") in Eastern Washington during the 1970s. During this period, liquid chemicals were disposed of at the Landfill by a number of entities, including Key Tronic and the United States Air Force. In the fall of 1980, the Washington Department of Ecology ("WDOE") tested drinking water wells in the area surrounding the Landfill and determined that they were contaminated by chemicals. Pet. Cert. Appendix B-2, *Key Tronic Corp. v. United States*, 766 F. Supp. 865, 867 (E.D. Wash. 1991). Key Tronic and Spokane County jointly retained consultants to further evaluate conditions at the Landfill, including extensive well water sampling and analyses. CR 44, Ex. 15. Beginning in 1983, Key Tronic, upon advice from WDOE and the County health district, supplied bottled water to residents adjacent to the Landfill and funded installation of a new water system. *Id.*

Key Tronic acted as a responsible corporate citizen by stepping forward and publicly acknowledging that it had previously disposed of hazardous wastes at the Landfill and by taking measures to reduce the public health threat to nearby residents. CR 44, Ex. 15; J.A. 7, CR 44, Ex. 16. Other entities that had disposed of hazardous wastes at the Landfill, including the Air Force, did nothing. CR 44, Ex. 15. Key Tronic undertook the necessary investigation to identify other potentially responsible parties ("PRP"), i.e., persons potentially liable under CERCLA, to ensure that they would share the costs of the ultimate long-term cleanup. J.A. 7, CR 44, Ex. 16. Key Tronic's efforts in identifying the Air Force as a PRP and in establishing the Air Force's disposal of

hazardous wastes at the Landfill resulted in action by the Environmental Protection Agency (the "EPA") against the Air Force. Pet. Cert. Appendix B-14 n.4, *Key Tronic*, 766 F. Supp. at 872 n.4.

In addition to identifying persons responsible for the contamination, Key Tronic retained counsel and a consultant to work with the EPA and WDOE to investigate the site, develop a remedy, and draft the scope of work and consent decree that established the remediation to be performed at the Landfill. Pet. Cert. Appendix B-13-14, *Key Tronic*, 766 F. Supp. at 872; CR 44, Exs. 16, 17. After performing this work, Key Tronic and Spokane County accepted financial responsibility for the cleanup and entered into a Consent Decree (the "Consent Decree") with the EPA and WDOE setting forth the remedy to be performed. Pet. Cert. Appendix B-2, *Key Tronic*, 766 F. Supp. at 867. Apart from its own response costs of approximately $1.2 million, Key Tronic agreed to pay $4.2 million under the Consent Decree. *Id.*

In a previous action before the same district court, the district court held the Air Force liable under Washington State law for its disposal of hazardous wastes at the Landfill. J.A. 29, CR 67, at 23. Thereafter, the Air Force and the EPA in February, 1990, finalized an Interagency Agreement whereby the Air Force agreed to pay $1.45 million to implement the remedy set forth in the Consent Decree. Pet. Cert. Appendix B-2, *Key Tronic*, 766 F. Supp. at 867; J.A. 9-10.

B. PROCEDURAL BACKGROUND

Key Tronic filed its complaint against the Air Force in October 1989.[1] CR 1. Key Tronic's complaint asserted a private cost-recovery claim under CERCLA Section 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (the "Section 107 claim"), and a contribution claim under CERCLA Section 113(f), 42 U.S.C. § 9613(f) (the "Section 113 claim"). The Air Force moved to dismiss both of Key Tronic's claims against it. CR 22. Key Tronic moved for partial summary judgment regarding the Air Force's liability on the Section 107 claim. CR 39.

The district court entered an order in August 1990 resolving the Air Force's motion to dismiss and Key Tronic's motion for partial summary judgment. J.A. 12, CR 67. First, as Key Tronic conceded the issue, the district court granted the Air Force's motion to dismiss the Section 113 claim (i.e., Key Tronic's claims for recovery of the $4.2 million incurred under the Consent Decree). J.A. 16-17, CR 67, at 6-7. Second, the district court denied the Air Force's motion to dismiss the Section 107 claim. J.A. 23, CR 67, at 15. Third, the district court granted Key Tronic's motion for partial summary judgment. The court held:

> Key Tronic moves for partial summary judgment that the USAF is liable under 42 U.S.C. § 9607(a)(4)(B) for a portion of the $1.2 million in costs Key Tronic privately incurred in responding to the Colbert release.

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[1]Key Tronic's complaint named several other defendants. During proceedings in the district court, defendant William Schmidt was dismissed, J.A. 29, CR 67 at 23, and the Alumax defendants settled. Pet. Cert. Appendix B-4, *Key Tronic*, 766 F. Supp. at 868.

> This court has previously held that the USAF disposed of hazardous waste at Colbert. (Oral Findings of Fact and Conclusions of Law, *Key Tronic Corp. v. United States*, C-88-041-JLQ and C-87-20-JLQ (E.D. WA, Nov. 3, 1989), p. 2; Ex. 1 to Plaintiff's Statement of Facts.) This fact establishes the USAF as a "person who . . . arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person . . ." 42 U.S.C. § 9607(a)-(3). It is undisputed that Colbert is a "facility" within the definition of 42 U.S.C. § 9601(9), and that a "release" has occurred at Colbert within the definition of 42 U.S.C. § 9601(22). Thus, under 42 U.S.C. § 9607 (a)-(4)(B), the USAF is liable for a portion of "any other necessary costs of response incurred by any other person consistent with the national contingency plan." Key Tronic's motion for partial summary judgment that the USAF is liable under 42 U.S.C. § 9607 should be granted.

J.A. 30, CR 67, at 23-24.

In light of these rulings, the Air Force and Key Tronic subsequently negotiated the amounts to be paid on Key Tronic's Section 107 response costs of approximately $1.2 million. First, the parties partially settled the Air Force's liability when the Air Force executed a consent decree providing for payment of $185,000 to Key Tronic on two categories of costs (well contamination investigation and provision of alternative water supplies), but reserved the remaining categories of costs (the "excepted claims"). CR 92. The excepted claims concerned (1) prelitigation costs and attorneys' fees for identifying PRPs, (2) prelitigation costs and attorneys' fees for work on the Consent Decree,

(3) attorneys' fees incurred in prosecuting this action, and (4) prejudgment interest on the excepted claims. Pet. Cert. Appendix B-3, *Key Tronic*, 766 F. Supp. at 867. The district court later ruled that all the "excepted claims" costs were recoverable as response costs in this action. Pet. Cert. Appendix B-6-14, *Key Tronic*, 766 F. Supp. at 869-72. Second, after that ruling, the Air Force reserved its right to appeal and stipulated that it would pay $155,000 on the excepted claims so that a final judgment could be entered. J.A. 43, CR 134.[2] Judgment was entered on July 1, 1991. CR 137, 138. The Air Force appealed from all excepted claims, except prejudgment interest, and the Ninth Circuit reversed. Pet. Cert. Appendix A, *Key Tronic*, 984 F.2d 1025.

V. SUMMARY OF ARGUMENT

CERCLA Section 107(a), 42 U.S.C. § 9607(a), expressly provides a right of action to any person to recover costs incurred in implementing CERCLA from any other liable person, including States and the United States. A

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[2]The stipulation excepted the following claims for appeal:

A. Costs and fees incurred by attorneys and investigators for Key Tronic in the amount of $365,649 during Key Tronic's search for additional potentially responsible parties and costs and fees incurred by attorneys related to the negotiation of the Consent Decree between Key Tronic, the United States, and the State of Washington in *The State of Washington v. County of Spokane*, CS-89-033-RJM;

B. The salary of David Powers, Key Tronic's General Counsel and Secretary, in the amount of $70,000 for time spent supervising the search for additional potentially responsible parties and negotiating the Consent Decree identified in A.

C. Attorneys' fees and costs incurred by Key Tronic in the prosecution of this action; and

D. Prejudgment interest on excepted claims.

person bringing such a cost-recovery action is entitled to recover its "response" costs, which CERCLA Section 101(25), 42 U.S.C. § 9601(25), defines to include costs of "enforcement activities." The plain language of the statute thus expressly permits any party to recover its "enforcement activities" costs in a Section 107(a) cost-recovery action. CERCLA's language and structure reveal that the words "enforcement activities" have no reasonable meaning other than to include attorneys' fees.

These express statutory provisions support CERCLA's two overriding goals: (a) encouraging all persons, including private persons, States, and Indian tribes, to respond to pollution and to clean up hazardous waste sites, and (b) holding liable all persons responsible for damage to the environment.

Under the American Rule, a prevailing party in litigation is not entitled to attorneys' fees absent a recognized ground in equity or statutory authorization for an award of fees. *Runyon v. McCrary*, 427 U.S. 160, 185 (1976); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 260 (1975). No magic words are required to provide for fees; to authorize the award of attorneys' fees Congress need only use language that evinces its intent that attorneys' fees are to be awarded. The amendment of the definition of "response" in 1986 to include costs of "enforcement activities" shows such an intent by expressly providing for an award of attorneys' fees to persons who enforce CERCLA. The Ninth Circuit erred in failing to award fees to Key Tronic.

VI. ARGUMENT

A. THE CERCLA STATUTE

CERCLA provides an express right of action to any person who has incurred costs to clean up a hazardous waste

site to recover those costs from any other person liable under CERCLA. Section 107(a)(4)(A) and (B) provide:

> Covered persons . . . shall be liable for—
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan . . . .

42 U.S.C. § 9607(a)(4)(A) and (B).[3]

CERCLA defines "response" as follows:

> The terms "respond" or "response" means [sic] remove, removal, remedy, and remedial action, *all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.*

42 U.S.C. § 9601(25) (emphasis added). The underscored language was added by the 1986 SARA amendments. Thus, the definition of "response" in Section 101(25), as amended by SARA, plainly applies to actions brought to recover "necessary costs of *response*" under Section 107(a)(4)(B) (emphasis added). There is no dispute that Section 101(25), a definitional section, applies to Key Tronic's private cost-recovery action under Section 107(a)(4)(B).

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[3]The district court ruled that the Air Force is a "covered person" liable under Section 107(a) and accordingly granted Key Tronic's motion for partial summary judgment on liability. J.A. 30, CR 67, at 23-24. The Air Force did not appeal from this ruling.

Congress provided an express right of action in Section 107(a) to all persons who implement CERCLA in order to further CERCLA's aims:

> CERCLA has two goals: (1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups.

H.R. Rep. No. 99-253 (III), 99th Cong., 2d Sess. 15 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038. *See also Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1455 (9th Cir. 1986) ("[CERCLA's] purpose was to ensure the prompt and effective cleanup of waste disposal sites, and to assure that parties responsible for hazardous substances bore the cost of remedying the conditions they created.") (citing statement of Rep. Florio, 126 Cong. Rec. 31,964 (1980)).

CERCLA's express right of action under Section 107(a) is designed to encourage prompt cleanups by providing for recovery of response costs to all persons willing and able to shoulder the costs of cleanups. That CERCLA encourages all persons to implement CERCLA's goals is hardly surprising given the enormity of the task of cleaning up the thousands of hazardous waste sites across our land. *See* H.R. Rep. No. 99-253(I), 99th Cong. 2d Sess., pt. 1, at 55, *reprinted in* 1986 U.S. Code Congressional and Administrative News ("U.S.C.C.A.N.") 2835, 2837 (noting tens of thousands of sites needing cleanup and stating that "EPA will never have adequate monies or manpower to address the problem itself. As a result, an underlying principle of H.R. 2817 is that Congress must facilitate cleanups of hazardous substances by

the responsible parties while assuring a strong EPA oversight role with a set of tough legal enforcement standards.").[4]

The Court has also noted CERCLA's goals:

> Congress did not think it enough, moreover, to permit only the Federal Government to recoup the costs of its own cleanups of hazardous-waste sites; the Government's resources being finite, it could neither pay up front for all necessary cleanups nor undertake many different projects at the same time. Some help was needed, and Congress sought to encourage that help by allowing private parties who voluntarily cleaned up hazardous-waste sites to recover a proportionate amount of the costs of cleanup from the other potentially responsible parties.

Pennsylvania v. Union Gas Co., 491 U.S. 1, 21-22 (1989) (plurality opinion).

B. "ENFORCEMENT ACTIVITIES" MEANS ATTORNEYS' FEES.

Given Section 101(25)'s plain language—providing that "enforcement activities" are to be recovered as costs of response for actions brought under Section 107(a)—the Court must determine whether Congress, by providing for the recovery of response costs, including costs of "enforcement activities," intended parties to recover attorneys' fees as costs of response under Section 107(a). Key Tronic submits that "this language [enforcement

[4]H.R. 2817 was the predecessor bill to the bill passed and enacted as SARA, Pub. L. 99-499. *See* 1986 U.S.C.C.A.N. 2835.

activities] must mean that private plaintiffs can recover the attorneys' fees expended in enforcing the liabilities that CERCLA imposes on polluters." Pet. Cert. Appendix C-16, *Stanton Road*, 984 F.2d at 1023 (Canby, J., dissenting).

The United States regularly seeks and recovers attorneys' fees when *it* brings a Section 107 cost-recovery action; and the courts have accepted that "enforcement activities" necessarily means, and provides for the recovery of, attorneys' fees when the United States brings suit. *See, e.g., United States v. Mottolo*, 695 F. Supp. 615, 631 (D.N.H. 1988) (relying on Section 101(25) to support award of attorneys' fees to the EPA in a cost-recovery action under 42 U.S.C. § 9607(a)); *United States v. Mexico Feed & Seed Co.*, 729 F. Supp. 1250, 1253-54 (E.D. Mo. 1990) (permitting United States to amend complaint to pray for costs of "enforcement activities" in a cost-recovery action under 42 U.S.C. § 9607(a)).

The United States itself argued to the Ninth Circuit in this case that "enforcement activities" includes attorneys' fees when the United States brings a cost-recovery action. Brief of United States at 13, *Key Tronic v. United States*, Ninth Circuit No. 91-36021, (filed on January 31, 1992) ("It is statutorily established that attorneys' fees incurred by the United States in seeking a remedial action or recovering costs under the Act are recoverable as response costs authorized by the Act, 42 U.S.C. 9604(b) *& 9601(25).*") (emphasis added). Key Tronic submits that if "enforcement activities" means attorneys' fees when the United States brings a Section 107(a) cost-recovery action, it must have the same meaning for other persons.

The United States argued to the Ninth Circuit that "enforcement activities" provides for attorneys' fees for the simple reason that there is no other reasonable meaning. As Judge Canby stated:

When Congress amended CERCLA to permit such private litigants, among others, to recover the "costs" of "enforcement activities," it is difficult to imagine what it might have had in mind other than the recovery of attorneys' fees. The "enforcement" of CERCLA by a private party consists in suing to hold the polluter liable. The lion's share of the enforcement cost, as opposed to cleanup cost, will lie in attorneys' fees. Congress cannot have been ignorant of that fact. A private party simply cannot recover its cost of enforcement if it cannot recover its attorneys' fees. If the language of Congress in sections 107(a)(4)(B) and 101(25) is to be given meaning and effect, those fees must be recoverable.

Pet. Cert. Appendix C-17, *Stanton Road*, 984 F.2d at 1023 (Canby, J. dissenting). *Accord General Electric Co. v. Litton Industrial Automation Systems, Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990) ("Attorney fees and expenses necessarily are incurred in this kind of enforcement activity and it would strain the statutory language to the breaking point to read them out of the 'necessary costs' that section 9607(a)(4)(B) allows private parties to recover."), *cert. denied*, 499 U.S. 937 (1991); *Donahey v. Bogle*, 987 F.2d 1250, 1256 (6th Cir.) (same), *cert. denied*, 126 L. Ed. 2d 594 (1993). Neither the language of the statute nor its history support any other reasonable interpretation.

Under CERCLA as originally enacted in 1980, the courts concluded that the United States was provided statutory authority to recover its attorneys' fees for enforcing the CERCLA liability scheme. *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 1009 (D.S.C. 1984) (under 42 U.S.C. § 9604(b)(1), United States

receives attorneys' fees for bringing Section 107 action), *aff'd in part and vacated in part*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); *United States v. Northeastern Pharmaceutical & Chemical Co.*, 579 F. Supp. 823, 851 (W.D. Mo. 1984)(same), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). The SARA amendment to Section 101(25), facially applying to cost-recovery actions brought under both Section 107(a)(4)(*A*) and Section 107(a)(4)(*B*), is rendered superfluous if construed to provide for the recovery of attorneys' fees only in favor of the United States, because the United States was awarded attorneys' fees prior to the 1986 amendment to Section 101(25).[5] Such an interpretation "violates [a] cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988). See also *Hastings Building Products, Inc. v. National Aluminum Corp.*, 815 F. Supp. 228, 232-33 (W.D. Mich. 1993) ("[B]efore the 1986 amendments, § 9604(b)(1) provided for the recovery of costs by the government. Therefore, the conclusion that the phrase 'enforcement costs' has no relevance to private parties assumes that Congress expended effort to alter § 9601(25) in 1986 with the intent of creating a redundant provision. This seems improbable.").

C. ENFORCEMENT ACTIVITIES ARE NOT LIMITED TO THE UNITED STATES.

Recognizing that the term "enforcement activities" encompasses attorneys' fees, and that Section 101(25) facially applies to private cost-recovery actions brought under Section 107(a)(4)(B), the United States contends that Section 101(25) has a limit not found in its plain and

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[5]Key Tronic is unaware of any court, either before or after SARA, that has refused attorneys' fees to the United States when it brings a Section 107(a) action.

unambiguous language. The United States contends that recovery of costs of "enforcement activities" is limited to recovery by the United States. This argument should be rejected.

The plain language of CERCLA, 42 U.S.C. § 9601(25) and § 9607(a), provides that a private person bringing a cost-recovery action under Section 107(a)(4)(B) (as well as an Indian tribe, a State *and* the United States government bringing a cost-recovery action under Section 107(a)(4)(A)) may recover costs of "enforcement activities." Thus, Section 101(25), permitting recovery of costs of "enforcement activities" as "response" costs, plainly and unambiguously applies to all persons who seek to recover response costs under Section 107(a).

If the United States' argument were correct, Congress would have limited the definition of "enforcement activities" to the United States. Congress did not do so. The United States' argument that Congress intended that it alone would recover attorneys' fees as costs of "enforcement activities" is belied by the plain language of the statute.

To avoid Section 101(25)'s plain language, the United States contends that SARA's legislative history reveals Congress' intent that only the United States is entitled to recover "enforcement activities" costs under Section 107(a). In this regard, the House Committee on Energy and Commerce commented that SARA's amendment of Section 101(25) "will confirm the EPA's authority to recover costs for enforcement actions taken against responsible parties." H.R. Rep. No. 99-253(I), 99th Cong., 2d Sess., pt. 1, at 66-67 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2848-49. The United States contends that this passage suggests, by negative implication, that *only* the EPA may recover costs of enforcement activities under Section 107(a).

The subsequent Conference Committee Report contains no such negative inference:

> The House amendment proposes to modify CERCLA section 101(25), which is the definition of "response," to expli- citly include enforcement activities.
>
> . . .
>
> The conference substitute adopts the House proposal. This amendment clarifies and confirms that such costs [i.e., enforcement costs] are recoverable from responsible parties, as removal or remedial costs under section 107.

H.R. Conf. Rep. No. 99-962, 99th Cong., 2d Sess. 185 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3278. The legislative history from the conference committee that reported the final bill passed and enacted thus contains no limiting reference to the EPA. *Accord* H.R. Rep. No. 99-253(V), 99th Cong., 2d Sess., pt. 1, at 5-6 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3124, 3129 ("[The change to § 101(25)] amends the definition of what constitutes a response to include related enforcement activities, thereby permitting recovery of those costs.").

In any event, resorting to a single piece of legislative history to support a proffered interpretation of Section 101(25), through negative implication, fails to address the plain language of Section 101(25). The proffered limitation of Section 101(25) should be rejected as contrary to the statute's plain and unambiguous language. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be

conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'") (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

D. PRIVATE PARTIES ENFORCE CERCLA.

Alternatively, the United States contends that Section 101(25)'s provision for recovery of "enforcement activities" costs applies only to the United States because only the United States can "enforce" CERCLA. That is patently untrue. The plain language of the statute provides that *all* persons who bring cost-recovery actions do so under Section 107(a)(4)(A) or (B) and that persons who bring an action under (B) are entitled to costs of "enforcement activities."

Like the United States, a private person, an Indian tribe or a State "enforces" statutory rights and "enforces" CERCLA's scheme by incurring costs to clean up hazardous waste sites and in bringing suit to effect CERCLA's policy that the costs of cleanup be borne by polluters. This is, indeed, the natural and commonplace understanding of the term "enforce," heard daily by attorneys and putative wrongdoers from aggrieved persons who vow to "enforce" their rights. Likewise, it is commonplace to hear attorneys and non-attorneys alike claim the existence of an "enforceable contract," i.e., a contract that a court will *enforce* in the context of *private* litigation. See also Webster's Ninth New Collegiate Dictionary 412 (1987) ("enforce" means: (1) to give force to: strengthen, (2) to urge with energy, (3) constrain, compel, (4) to effect or gain by force, (5) to carry out effectively).

In accord with both the common understanding of "enforce," and with its dictionary definition, the Court has stated that an express statutory right of action provides the

"vehicle for private enforcement" of the laws. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109 (1986) (discussing private right of action in context of antitrust laws). *See also Alyeska*, 426 U.S. at 263 (noting that statutes providing for award of fees generally suggest that Congress has "opted to rely heavily on private *enforcement* to implement public policy....") (emphasis added).

Further, private parties and the EPA engage in the same activities regardless of who enforces CERCLA. The EPA may investigate potentially responsible parties with respect to contamination at a CERCLA site, investigate and develop appropriate remedial actions, and pursue legal action to have responsible parties held liable for such response costs. 42 U.S.C. § 9604. All these activities constitute "enforcement" if performed by the EPA; they are activities necessary to "enforce" the liabilities and responsibilities created by CERCLA. If, however, a responsible party implements CERCLA, a private party, rather than the EPA, will undertake the same enforcement activities that the EPA otherwise might have performed. This is to be encouraged, as the EPA alone is unable to respond to the thousands of sites awaiting cleanup. *See Union Gas*, 491 U.S. at 21-22. The enforcer of CERCLA — whether the EPA or a private party — does not determine whether an activity is an "enforcement activity" within the meaning of Section 101(25); rather, the *nature* of the activity controls. CERCLA provides that Congress intended private parties *and* the EPA to do the same things: promptly clean up hazardous waste sites and later recover the costs of such cleanups from other responsible persons.

In this case, Key Tronic implemented CERCLA's goal of cleaning up contamination when it paid to address problems caused by pollution at the Landfill. Likewise, Key Tronic furthered CERCLA's goal of requiring polluters to pay when it retained experts and attorneys to (1) investigate

persons responsible for that pollution, (2) negotiate and draft the Consent Decree setting forth the ultimate cleanup plan, and (3) bring this Section 107(a) action. Key Tronic "urged with energy," "compelled," and "carried out effectively" CERCLA's express goals. In short, Key Tronic "enforced" CERCLA.[6] Any other reading thwarts Congress' express intent that CERCLA be enforced by the United States and others, including States, Indian tribes or any other person, and ignores Congress' plain language in providing that *all* such persons are authorized to recover costs of "enforcement activities."

E. ATTORNEYS' FEES—THE AMERICAN RULE

The prevailing party in an action may not recover its attorneys' fees absent a recognized ground in equity or statutory authorization for an award of fees. *Runyon*, 427 U.S. at 185-86; *Alyeska*, 421 U.S. at 260. Congress is not restricted to using "magic words" to clearly manifest its intent that attorneys' fees be awarded.

In *Union Gas*, 491 U.S. 1, the Court considered whether Congress intended to subject the States to suit in federal court for liability under CERCLA. Because Congress' abrogation of the States' immunity from suit implicates important issues of federalism, Congress must employ "unmistakably clear language" to abrogate the States' Eleventh Amendment immunity. *Welch v. State Department of Highways & Public Transportation*, 483 U.S. 468, 478 (1987). See also *Quern v. Jordan*, 440 U.S. 332, 345 (1979) (no abrogation when statute failed "explicitly and by clear

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[6]*General Elec.*, 920 F.2d at 1422 (private cost-recovery action under Section 107(a)(4)(B) is "enforcement activity"); *Cadillac Fairview/Cal., Inc. v. Dow Chem. Co.*, 840 F.2d 691, 694 (9th Cir. 1988) (same); *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986) (same).

language [to] indicate on its face an intent to sweep away the immunity of the States").

Notwithstanding that CERCLA does not use the words "Eleventh Amendment," "abrogate" or "immunity," the Court examined the language and structure of CERCLA to determine whether Congress nevertheless intended to abrogate Eleventh Amendment immunity. After reviewing CERCLA's language and structure, in conjunction with the SARA amendments, the Court held that Congress clearly intended to abrogate the States' Eleventh Amendment immunity. *Union Gas*, 491 U.S. at 13, 30. In this regard, the Court stated: "If no magic words are required for abrogation [of Eleventh Amendment immunity], then each statute must be evaluated on its own terms, not defeated by reference to another statute that uses more specific language." *Id.* at 13 n.4.

If no "magic words" are needed to meet the rigorous standards applicable to abrogation of Eleventh Amendment immunity, certainly no "magic words" are necessary for Congress to authorize an award of fees. As discussed above, Congress' amendment of the definition of "response" to include costs of "enforcement activities" has no reasonable meaning other than to authorize an award of attorneys' fees. Thus, the language and structure of CERCLA, as amended by SARA, reveal that Key Tronic may recover its attorneys' fees in this action.

The Ninth Circuit agreed that attorneys' fees are "ordinarily expended in a private response action." Pet. Cert. Appendix C-9, *Stanton Road*, 984 F.2d at 1020. The Ninth Circuit held, however, that Section 107(a)(4)(B)'s provision for the recovery of "necessary costs of response" did not explicitly provide for the recovery of attorneys' fees under *Runyon* and *Alyeska*. Pet. Cert. C-7, *Stanton Road*, 984 F.2d at 1019. *Accord FMC Corp. v. Aero Industries, Inc.*, 998

F.2d 842, 847 (10th Cir. 1993); *In re Hemingway Transport, Inc.*, 993 F.2d 915, 935 (1st Cir.), *cert. denied*, 114 S. Ct. 303 (1993).

The Ninth Circuit's holding was predicated upon an application of *Alyeska* and *Runyon* that fails to acknowledge the difference in the specificity of the language of the statutes in those cases with the language of CERCLA and fails to acknowledge that no "magic words," *Union Gas*, 491 U.S. at 13 n.4, are required to conclude that Congress intended attorneys' fees to be recovered.

In *Alyeska*, the prevailing litigant secured relief in the district court for violations of 30 U.S.C. § 185 and 42 U.S.C. § 4321 *et seq. Alyeska*, 421 U.S. at 242-43. Although neither 30 U.S.C. § 185 nor 42 U.S.C. § 4321 provided any language remotely suggesting an award of fees to a prevailing party, and no alternative statutory authorization for an award of fees existed, the D.C. Circuit nonetheless held that fees were recoverable because the plaintiffs had vindicated "important statutory rights of all citizens." 421 U.S. at 245. After extensive review of the history of the American Rule, the Court reversed and held that attorneys' fees ordinarily may be awarded only when Congress has specifically provided for their recovery. *Id.* at 269-71.

In *Runyon*, the plaintiffs successfully sued for relief from racial discrimination under 42 U.S.C. § 1981, and the district court awarded attorneys' fees. 427 U.S. at 166. Following *Alyeska*, the Fourth Circuit reversed the award of fees. The petitioners argued to the Court that the fees were properly awarded under *Alyeska* because 42 U.S.C. § 1988 authorizes the federal courts "to furnish suitable remedies" for violations of a person's civil rights. 427 U.S. at 184.

The Court rejected this argument because:

> [N]othing in the legislative history of that statute [42 U.S.C. § 1988] suggests that such a radical departure from the long-established American rule forbidding the award of attorneys' fees was intended.

Runyon, 427 U.S. at 185. The Court accordingly held:

> the law of the United States, but for a few well-recognized exceptions not present in these cases, has always been that absent explicit congressional authorization, attorneys' fees are not a recoverable cost of litigation. Hence in order to "furnish" an award of attorneys' fees, we would have to find that at least as to cases brought under statutes to which § 1988 applies, Congress intended to set aside this long-standing American rule of law. *We are unable to conclude, however, from the generalized commands of § 1988, that Congress intended any such result.*

Id. at 185-86 (emphasis added).

In contrast to the complete absence of language evidencing Congress' intent that fees be recovered under the statutes in *Runyon* and *Alyeska*, Section 101(25) explicitly provides that persons bringing suit under Section 107(a) are entitled to recover the costs of "enforcement activities." This language is vastly different from the statutes at issue in *Runyon* and *Alyeska*. No "magic words," *Union Gas*, 491 U.S. at 13 n.4, or "particular linguistic formula," Pet. Cert. Appendix C-18, *Stanton Road*, 984 F.2d at 1024 (Canby, J., dissenting), are required to reveal Congress' intent that attorneys' fees are recoverable response costs under Section 107(a). Because there is no reasonable interpretation

of "enforcement activities" other than one that includes attorneys' fees, the Ninth Circuit erred when it failed "to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times." *Union Gas*, 491 U.S. at 30 (Scalia, J., concurring in part and dissenting in part).[7]

The Ninth Circuit also supported its reasoning by referring to CERCLA Section 310, 42 U.S.C. § 9659, which provides for the recovery of "attorney fees" to citizens suit plaintiffs. The Ninth Circuit concluded that CERCLA's disparity in language, "attorney fees" under 42 U.S.C. § 9659 versus "response" costs and costs of "enforcement activities" under Section 107(a), suggested that attorneys' fees are not recoverable in a Section 107(a) action.[8] Pet. Cert. Appendix C-7, *Stanton Road*, 984 F.2d at 1018. This argument is unpersuasive for three reasons.

First, the citizens suit provision authorizes a citizen to bring an action to correct certain CERCLA violations or to remedy a failure on the part of the EPA to perform a non-discretionary duty. 42 U.S.C. § 9659(a). The citizens suit provision allows for the imposition of civil penalties, but

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[7]The Ninth Circuit also erroneously concluded that the provision for attorneys' fees was not sufficiently explicit under *Runyon* and *Alyeska* because courts had split on this issue. Pet. Cert. Appendix C-7, *Stanton Road*, 984 F.2d at 1019. First, the courts in accord with the Ninth Circuit's holding that fees are not recoverable have employed analyses similar to the Ninth Circuit's flawed analysis. Second, this argument held true with respect to whether CERCLA abrogated the Eleventh Amendment; yet such a "'judicial headcount' is, of course, not dispositive." *Union Gas*, 491 U.S. at 46-47 (White, J., concurring in part and dissenting in part).

[8]The Ninth Circuit's decision creates the rather strange inconsistency of allowing fees to citizens suit plaintiffs who seek to further CERCLA's goals by having someone else pay for a cleanup, but *not* allowing fees to persons like Key Tronic who actually step up to the line and pay for a cleanup.

not the recovery of response costs. 42 U.S.C. § 9659(c). Because a citizens suit plaintiff could not recover fees as "response" costs, Congress provided in 42 U.S.C. § 9659(f) for the recovery of "attorney fees" in order to authorize the recovery of fees under *Runyon* and *Alyeska*.

Second, "enforcement activities" encompasses a broader meaning than "attorneys' fees." One of the statutory provisions relied upon by the United States for an award of fees, 42 U.S.C. § 9604(b)(1), authorizes it to recover its costs of "legal . . . studies," a more expansive term than "attorneys' fees." In the CERCLA context, the need for attorneys to expend time and effort, particularly to identify other potentially responsible persons, arises long before litigation begins. Without providing a more expansive term for recovering attorneys' fees, such as "enforcement activities" or "legal . . . studies," prelitigation attorneys' fees incurred to enforce CERCLA might not be recoverable under the litigation-bound analysis of *Alyeska* and *Runyon*. Thus, the more expansive terms, providing for recovery of costs of "enforcement activities" and "legal . . . studies," bring these prelitigation fees within their meaning.

Third, CERCLA nowhere provides for a recovery of fees to the United States by using the words "attorneys' fees." In *Stanton Road*, the Ninth Circuit, however, stated that the United States may recover its fees when bringing a Section 107(a) cost-recovery action pursuant to 42 U.S.C. § 9604(b)(1)'s provision for recovery of costs of "legal . . . studies." Pet. Cert. Appendix C-7, *Stanton Road*, 984 F.2d at 1019. That the Ninth Circuit understood that the United States may recover attorneys' fees under the rubric "legal . . . studies" costs, instead of "attorneys' fees," underscores the Ninth Circuit's erroneous reading of CERCLA and *Runyon*. The different wording illustrates that (a) Congress is *not* required to employ particular words to evidence its intent that fees be recovered, and (b) different wording, "legal . . .

studies" and "enforcement activities" costs versus "attorneys' fees," was employed to allow a more expansive recovery of attorneys' fees, including fees incurred outside of actual litigation, to persons who incur costs in cleaning up hazardous waste sites.

An award of attorneys' fees, specifically provided for as costs of "enforcement activities," is also fully consistent with and furthers CERCLA's purpose of promoting prompt cleanup of the environment and protection of public health. Key Tronic stepped forward and paid more than its fair share of response costs. It then incurred significant costs in enforcing CERCLA's scheme of requiring all polluters to pay. A ruling that attorneys' fees are recoverable encourages prompt cleanups, because persons are more likely to volunteer to act promptly to clean up hazardous waste sites if they are able to recover from other liable parties a portion of all response costs, including costs of enforcing CERCLA's liability scheme.

A ruling denying attorneys' fees, however, defeats CERCLA's goal of encouraging prompt cleanups. Such a ruling strongly discourages parties from responding to contamination; without the ability to recover attorneys' fees for enforcing CERCLA's liability scheme, a party otherwise willing and able to clean up a polluted site will be less likely to do so. Such a party may wait for others to do the work because it does not wish to bear the substantial expense of enforcing CERCLA. In that event, no work will be done on a site because there will be no volunteers. A ruling that attorneys' fees are not recoverable as "enforcement activities" will discourage volunteers and thwart prompt cleanups. Such a ruling would frustrate, not further, Congress' express intent of having persons, including private persons, promptly clean up the vast number of hazardous waste sites across the nation. As stated by the Sixth Circuit:

> "By providing private parties with a federal cause of action for the re- covery of necessary expenses in the cleanup of hazardous wastes, Congress intended § 107 as a powerful incentive for these parties to expend their own funds initially without waiting for the responsible persons to take action. The court can conceive of no surer method to defeat this purpose than to require private parties to shoulder the financial burden of the very litigation that is necessary to recover these costs."

Donahey, 987 F.2d at 1256 (quoting *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692, 710 (D. Kan. 1991)); *General Elec.* 920 F.2d at 1422 (CERCLA's purpose of ensuring prompt cleanup and imposition of cleanup costs on responsible parties would be undermined if polluters did not pay litigation costs).

VII. ATTORNEYS' FEES ARE OTHERWISE RECOVERABLE.

For two additional reasons, attorneys' fees are recoverable even if the Court concludes that they are not authorized as "enforcement activities" under Section 107(a). First, a party who incurs costs, including attorneys' fees, in bringing about a common benefit is entitled to recover those costs from the persons benefited. *See, e.g., Alyeska*, 421 U.S. at 257-58 (noting common fund exception to American Rule); *Hall v. Cole*, 412 U.S. 1, 5-7 (1973) (noting common benefit exception to American Rule). Someone must bear the transaction costs in implementing CERCLA. When one party, among several statutorily liable persons, bears the costs, including attorneys' fees, associated with designing and negotiating the cleanup of a polluted site, identifying the persons responsible for the pollution, and spreading those

costs among the persons liable, a common benefit is conferred on all liable parties. This common benefit should be recoverable.

Second, even if attorneys' fees are not recoverable under the common benefit exception to the American Rule, attorneys' fees incurred prior to litigation should be recoverable as response costs irrespective of the American Rule. In *FMC Corp.*, 998 F.2d at 847-48, the Tenth Circuit concluded that *Alyeska* and *Runyon* barred recovery of attorneys' fees arising from private cost-recovery *litigation* under Section 107(a)(4)(B). The Tenth Circuit held, however, that *non*litigation attorneys' fees are recoverable:

> We reach a different legal conclusion, however, with respect to nonlitigation attorneys fees. Such fees do not fall under the American rule set out in *Alyeska* and *Runyon* because they are not incurred in pursuing litigation. Accordingly, recovery of these fees is not barred as a matter of law. Rather, the issue is whether nonlitigation attorneys fees are necessary response costs within the meaning of section 9607(a)(4)(B).
>
> . . . .
>
> . . . Plaintiffs seek recovery of the nonlitigation attorneys fees generated in designing and negotiating the removal action and in preparing and carrying out the work plan approved by the EPA. For example, plaintiffs submitted affidavits to the district court evidencing fees paid for negotiating and drafting contracts with environmental professionals who performed the removal work, negotiating changes to the work plan, and monitoring work progress. We cannot say as a matter of law that, under the circumstances here, none of these nonlitigation attorneys fees were necessary response costs.

Id.

While Key Tronic urges the Court to hold that it is entitled to all attorneys' fees, not just nonlitigation fees, Key Tronic requests in the alternative that the Court adopt the Tenth Circuit analysis. The Air Force stipulated to pay $155,000 of the following amounts on the excepted claims:

> A. Costs and fees incurred by attorneys and investigators for Key Tronic in the amount of $365,649 during Key Tronic's search for additional potentially responsible parties and costs and fees incurred by attorneys related to the negotiation of the Consent Decree between Key Tronic, the United States, and the State of Washington in *The State of Washington v. County of Spokane*, CS-89-033-RJM;
>
> B. The salary of David Powers, Key Tronic's General Counsel and Secretary, in the amount of $70,000 for time spent supervising the search for additional potentially responsible parties and negotiating the Consent Decree identified in A.
>
> C. Attorneys' fees and costs incurred by Key Tronic in the prosecution of this action.

Pet. Cert. Appendix B-3, *Key Tronic*, 766 F. Supp. at 867. If the Court adopts the Tenth Circuit approach, the Court

should remand for entry of a modified award under the stipulation.

VIII. CONCLUSION

For the reasons stated, the judgment of the Ninth Circuit should be reversed. The Court should reverse the judgment of the Ninth Circuit and remand with instructions to (1) reinstate the district court judgment, (2) award fees and costs on appeal, and (3) calculate interest on the district court judgment.

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PERTINENT PROVISIONS OF 42 U.S.C. § 9601 ET SEQ.

§ 9601. Definitions

For purposes of this subchapter—

. . .

(25) The terms "respond" or "response" means remove, removal, remedy, and remedial action, all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.

§ 9607. Liability

(a) **Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date**

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel

owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
>
> (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

§ 9659. Citizens suits

(a) Authority to bring civil actions

Except as provided in subsections (d) and (e) of this section and in section 9613(h) of this title (relating to timing

of judicial review), any person may commence a civil action on his own behalf—

> (1) against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter (including any provision of an agreement under section 9620 of this title, relating to Federal facilities); or
>
> (2) against the President or any other officer of the United States (including the Administrator of the Environmental Protection Agency and the Administrator of the ATSDR) where there is alleged a failure of the President or of such other officer to perform any act or duty under this chapter, including an act or duty under section 9620 of this title (relating to Federal facilities), which is not discretionary with the President or such other officer.

Paragraph (2) shall not apply to any act or duty under the provisions of section 9660 of this title (relating to research, development, and demonstration).

. . .

(c) Relief

The district court shall have jurisdiction in actions brought under subsection (a)(1) of this section to enforce the

standard, regulation, condition, requirement, or order concerned (including any provision of an agreement under section 9620 of this title), to order such action as may be necessary to correct the violation, and to impose any civil penalty provided for the violation. The district court shall have jurisdiction in actions brought under subsection (a)(2) of this section to order the President or other officer to perform the act or duty concerned.

(d) Rules applicable to subsection (a)(1) actions

(1) Notice

No action may be commenced under subsection (a)(1) of this section before 60 days after the plaintiff has given notice of the violation to each of the following:

(A) The President.

(B) The State in which the alleged violation occurs.

(C) Any alleged violator of the standard, regulation, condition, requirement, or order concerned (including any provision of an agreement under section 9620 of this title).

Notice under this paragraph shall be given in such manner as the President shall prescribe by regulation.

(2) Diligent prosecution

No action may be commenced under paragraph (1) of subsection (a) of this section if the President has commenced and is diligently prosecuting an action under this chapter, or under the Solid Waste Act [42 U.S.C.A. § 6901 et seq.] to require compliance with the standard, regulation, condition, requirement, or order concerned (including any provision of an agreement under section 9620 of this title).

(e) Rules applicable to subsection (a)(2) actions

No action may be commenced under paragraph (2) of subsection (a) of this section before the 60th day following the date on which the plaintiff gives notice to the Administrator or other department, agency, or instrumentality that the plaintiff will commence such action. Notice under this subsection shall be given in such manner as the President shall prescribe by regulation.

(f) Costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.